No. 76-1708

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD MARTIN STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 52-54) and the opinion of the district court (Pet. App. 43-51) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1977. The petition for a writ of certiorari was filed on May 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was the subject of unconstitutional selective prosecution.

2. Whether the evidence was sufficient to support petitioner's conviction.

3. Whether the prosecutor's comments in closing argument violated petitioner's right against self-incrimination.

4. Whether the trial court erred in refusing to instruct the jury as petitioner requested.

5. Whether the indictment was defective because it did not refer to pertinent regulations.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of one count of fraudulent or knowing failure to manifest or declare merchandise, in violation of 18 U.S.C. 545. Petitioner was sentenced to two years' probation. The court of appeals affirmed (Pet. App. 52-54).

1. On November 12, 1972, petitioner, a customs house broker returning from Canada, stopped at the primary inspection station of the Detroit-Windsor Tunnel. The United States Customs Inspector asked, "What are you bringing back from Canada?" Petitioner responded, "Nothing." After further questioning, the customs inspector asked, "And you didn't purchase anything?" Petitioner responded, "Some toys." The inspector then told petitioner to open the car's trunk. Inside, the inspector found clothing and merchandise. The inspector next asked petitioner how much he had spent in Canada and petitioner responded, "About $400.00." The inspector then sent petitioner to a secondary inspection station (Tr. I 74-80). At this station, petitioner listed the total value of his merchandise at $500.00; he was thereupon requested to take all of his merchandise to the Customs Office. After partial compliance, petitioner was instructed a second time to remove all of the merchandise from his car (Tr. II 8-9). At the customs station, petitioner listed the value of his goods at $400.00 to $500.00. Upon an examination of petitioner's

receipts, the customs agents determined that the actual value of the merchandise was in excess of $780.00. Petitioner was charged a duty and personal penalty (Tr. IV 41-43).

2. A pretrial hearing on petitioner's motion to dismiss the indictment on the basis of selective prosecution established that failure to declare personal property normally results in administrative action. In the previous 17 years only three criminal prosecutions had been brought in the Detroit area for knowing failure to declare merchandise other than weapons or narcotics. In this case, customs supervisor Gary Liming authorized petitioner's arrest for the following reasons:

> So it appears at least three, perhaps four occasions, he was offered an opportunity to make a clean or proper declaration and he did not do it. So this was the reason. And then and only then did we start considering the fact that he was a Customs house broker charged with the responsibility of upholding the Customs laws. And because of that, he was arrested. [E.T. 158.][1]

Petitioner was incarcerated overnight. The following morning, customs agent Clifford Best told petitioner, "Mr. Stern, you probably feel that what is happening to you is because you are Jewish. But let me assure you that it is not" (E.T. 58-65). Best had previously investigated petitioner although no action had been taken as a result (E.T. 14, 137-138, 150-151).

Petitioner subsequently was indicted by a grand jury. The prosecutor stated that his decision to prosecute was based on three factors:

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[1] "E.T." refers to the transcript of the evidentiary hearing.

> Number one, Donald Stern was in fact guilty of the offense as charged; number two, that there exists a reasonable probability that he would be convicted at trial; and number three, that the best interests of justice will be served by prosecution and conviction. [E.T. 191.]

Based on the evidence adduced at the hearing, the district court found that although agent Best's conduct was "a monument to misguided zeal and bad judgment," Best's ethnic comments and petitioner's overnight incarceration were not the result of anti-Semitism (Pet. App. 43-47). The district court further found that petitioner had shown nothing to indicate that the Assistant United States Attorney acted with improper motive in presenting evidence to the grand jury. The court therefore held that while the proceedings against petitioner "may reflect bad judgment" (Pet. App. 39), the prosecution was not based on religious considerations and did not amount to a constitutional violation (Pet. App. 39-40). The district court reaffirmed this holding in denying petitioner's motion for judgment of acquittal (Pet. App. 41-51). The court of appeals affirmed (Pet. App. 52-54).

ARGUMENT

1. Petitioner's contention (Pet. 15-22) that the prosecution was based on improper considerations is not supported by the evidence, as both courts below found. While we do not dispute the district court's conclusion that the acts of agent Best showed "misguided zeal and bad judgment" (Pet. App. 37), the prosecution stemmed from an independent review of the facts by the Assistant United States Attorney and his conclusion that a prosecution would serve "the best interests of justice" (E.T. 191).

In *Oyler* v. *Boles*, 368 U.S. 448, 456, this Court held that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." To prove an equal protection violation, petitioner must show that his prosecution was based on "an unjustifiable standard such as race, religion, or other arbitrary classification" (*Oyler* v. *Boles, supra,* 368 U.S. at 456) or an attempt to prevent exercise of constitutional rights (*United States* v. *Falk*, 479 F. 2d 616 (C.A. 7); *Moss* v. *Horning*, 314 F. 2d 89 (C.A. 2)). As both courts below concluded (Pet. App. 50-51, 52-54), petitioner did not make out such a violation here. The fact that few customs violations of this type result in prosecution "is not in itself a federal constitutional violation." *United States* v. *Brookshire*, 514 F. 2d 786, 788-789 (C.A. 10).

2. Petitioner's claim (Pet. 22-26) that the evidence was insufficient to support the conviction is without merit. He was given four opportunities to declare all of his purchases and each time either denied that he had purchased anything in Canada or understated the value of his goods. The government also introduced evidence to show that, as a licensed customs house broker, petitioner was or should have been aware of his obligation to declare goods being introduced into the United States. When viewed in the light most favorable to the government, there was sufficient evidence to prove petitioner's guilt beyond a reasonable doubt.

3. Petitioner also contends (Pet. 26-27) that his Fifth Amendment right to remain silent was violated when the prosecutor, in his closing argument, stated that petitioner's four character witnesses did not include business associates.[2] Since petitioner testified in his own defense,

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[2]Petitioner introduced four acquaintances who testified as to his reputation for veracity (Tr. IV 9-11, 12-15, 26-27, 34-36). In rebuttal, the government introduced three witnesses who testified that petitioner's reputation for honesty in his business affairs was not good (Tr. V 38-40, 45-46, 53-54).

the prosecutor's remark manifestly cannot be held a violation of *Griffin* v. *California*, 380 U.S. 609, as petitioner suggests they were. Nor was the prosecutor's statement an "attempt to shift the burden of proof" to petitioner (Pet. 26). In light of the fact that petitioner chose to put his character in issue, the prosecutor's comment was entirely proper. See Fed. R. Evid. 404(a)(1).

4. Petitioner argues (Pet. 27-28) that he was entitled to have the court present his "theory" of the case to the jury. Essentially, petitioner's defense was that he did not hear the customs inspector ask him if he had purchased anything in Canada and that he was not aware that the total value of his merchandise exceeded $500.00. This is not a "theory" but simply a denial of guilty knowledge. "What is required before the theory of the case rule comes into play is a more involved theory involving 'law' or fact, or both, that is not so obvious to any jury." *Laughlin* v. *United States*, 474 F. 2d 444, 455 (C.A.D.C.), certiorari denied, 412 U.S. 941.

5. Finally, petitioner contends (Pet. 28-30) that the indictment was insufficient because, while it specified the statutes alleged to have been violated, it did not specify pertinent regulations. Petitioner did not raise this issue until the trial was well under way (Tr. III) and did not request a bill of particulars enumerating the pertinent regulations before trial. Accordingly, as petitioner admitted at trial (Tr. III 26), he waived his right to object unless the indictment failed to state an offense. See Fed. R. Crim. P. 7 and 12(b)(2) and (f).

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."

Hamling v. *United States*, 418 U.S. 87, 117. See also *Russell* v. *United States*, 369 U.S. 749; *United States* v. *Debrow*, 346 U.S. 374. The indictment here (Pet. App. 32-34) charged that petitioner on November 12, 1972, "fraudulently or knowingly did import or bring merchandise, that is, various pieces of clothing, china, antiques, and decorative brass and copper ware, into the United States," and that petitioner "failed to manifest or declare" this merchandise in violation of 19 U.S.C. 1459 and "failed to declare all articles which he brought into the United States," in violation of 19 U.S.C. 1498(a)(6). Thus it plainly was sufficient under *Hamling*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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